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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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12 IPS GROUP, INC.,

13 Plaintiff,

14 v.

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16 DUNCAN SOLUTIONS, INC., et al.,

17 Defendants.
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Case No.: 15cv1526-CAB-MDD

**ORDER ON JOINT MOTION
PRESENTING DEFENDANT
DUNCAN PARKING
TECHNOLOGIES, INC.'S
MOTION FOR DISCOVERY
SANCTIONS AND PLAINTIFF'S
MOTION FOR PROTECTIVE
ORDER**

[ECF NO. 150]

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22 Pending before the Court is a Joint Motion of the parties presenting
23 Defendant Duncan Parking Technologies, Inc.'s ("DPT") Motion for Discovery
24 Sanctions against Plaintiff and Plaintiff's Cross-Motion for a Protective
25 Order, filed on July 13, 2017. (ECF No. 150).

26 DPT asserts that sanctions should be imposed because counsel for
27 Plaintiff improperly instructed witnesses not to answer on grounds of

1 relevance; instructed a third-party witness not to answer on grounds of
2 privilege; presented two witnesses under Rule 30(b)(6) who were not properly
3 prepared; instructed witnesses to read every page of lengthy documents on
4 the record to add to the running time; and, engaged in unprofessional conduct
5 including standing and leaning over the table, pointing and yelling. (See ECF
6 No. 150 at 3).¹

7 For relief, DPT seeks additional deposition time with Messrs. King,
8 Randall and Hall to follow up on topics where the witnesses improperly were
9 instructed not to answer; additional Rule 30(b)(6) deposition time on the
10 topics for which the witnesses presented were unprepared; reasonable costs
11 of travel and 50% of attorney's fees incurred for the additional deposition
12 time; an order preventing speaking objections and coaching by requiring
13 objections be to "form;" \$8000 to offset fees and expenses associated with the
14 first depositions; and, \$5000 for fees associated with filing the instant motion.
15 (ECF No. 150 at 4).

16 For its part, Plaintiff opposes and cross-moves for a protective order.
17 Specifically, Plaintiff seeks a protective order: 1. "limiting" the recall of Mr.
18 Hall, the third party witness who was Plaintiff's patent prosecution counsel,
19 but really appears to be seeking to prevent his recall; 2. "limiting" the recall
20 of its CEO, Mr. King, but claims that the instructions to Mr. King not to
21 answer were justified; 3. Preventing the recall of its CTO, Mr. Schwarz; and,
22 4. Preventing the recall of its COO, Mr. Randall. (ECF No. 150 at 5-7).

23 In the instant Joint Motion, DPT is not seeking to compel specific
24 answers to specific questions under Fed. R. Civ. P. 37(a)(3)(B)(i), instead
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27 ¹ The Court will refer to pleadings and documents filed by their docket number in CM/ECF
and refer to the page numbers assigned by CM/ECF rather than their original pagination.

1 seeking sanctions as provided above. DPT did not identify the Federal Rule
2 applicable to this dispute. For edification of the reader, and counsel for DPT,
3 the applicable Rule is Rule 30(d)(2). Plaintiff properly grounds its motion for
4 a protective order under Rules 26(c) and 30(d)(3).

5 DPT's decision to seek sanctions only under Rule 30(d)(2) and not seek
6 to compel specific answers to certain questions or to compel Plaintiff to
7 present properly prepared designees under Rule 37 is curious. DPT's tactical
8 choice limits the Court to determining whether Plaintiff impeded, delayed or
9 frustrated the fair examination of a deponent rather than merely finding that
10 a deponent failed to answer a question or that Plaintiff failed to make a
11 proper designation allowing the Court more easily to provide the relief
12 sought. So be it.

13 As it is, this case presents a series of rather petty disputes arising from
14 the manner in which counsel for Plaintiff defended four depositions. For the
15 most part, counsel for Plaintiff did little to reflect the civility and
16 professionalism expected of an attorney practicing in this Court. Plaintiff's
17 counsel also may not understand that the Federal Rules of Civil Procedure
18 that govern deposition practice are not merely advisory.

19 **LEGAL STANDARD**

20 Rule 30(d)(2), Fed. R. Civ. P., provides:

21 The court may impose an appropriate sanction – including the
22 reasonable expenses and attorney's fees incurred by any party –
23 on a person who impedes, delays, or frustrates the fair
examination of the deponent.

24 Rule 30(d)(2) sanctions do not require a finding of bad faith. *See Robinson v.*
25 *The Chefs' Warehouse*, 2017 WL 1064981 *2, No. 3:15-cv-05421-RS (KAW)
26 (N.D. Cal. March 21, 2017).
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1 Rule 26(c), Fed. R. Civ. P., provides that a party from whom discovery is
2 sought may seek a protective order which the court, for good cause, may issue
3 “to protect a party or person from annoyance, embarrassment, oppression, or
4 undue burden and expense.”

5 Rule 30(d)(3), Fed. R. Civ. P., provides:

6 during a deposition, the deponent or a party may move to
7 terminate or limit it on the ground that it is being conducted in
8 bad faith or in a manner that unreasonably annoys, embarrasses,
9 or oppresses the deponent or party. . . . If the objecting party so
10 demands, the deposition must be suspended for the time necessary
11 to obtain an order.

12 Finally, Rule 30(c)(2), Fed. R. Civ. P., provides, in pertinent part:

13 An objection must be stated concisely in a nonargumentative and
14 nonsuggestive manner. A person may instruct a deponent not to
15 answer only when necessary to preserve a privilege, to enforce a
16 limitation ordered by the court, or to present a motion under Rule
17 30(d)(3).

18 Instructing a deponent not to answer a question on any grounds not
19 delineated in Rule 30(c)(2) can be grounds for sanctions under Rule 30(d)(2).
20 See *Nguyen v. LVNV Funding, LLC, et al.*, 2017 WL 951026 *12, No.
21 15cv0758-LAB-RBB (S. D. Cal. March 10, 2017).

22 ANALYSIS

23 I. Instructions Not to Answer

24 a. King Deposition²

25 DPT asserts that counsel for Plaintiff improperly instructed witnesses
26 King and Hall not to answer certain questions and provided excerpts from
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² A redacted version of the transcript of the King deposition can be viewed at ECF No. 192-3.

1 those depositions for review. (*See* ECF No. 191). A review of the excerpts
2 and the underlying transcript shows that attorney Christopher D. Mays, of
3 the law firm Wilson Sonsini Goodrich & Rosati P.C., representing Plaintiff,
4 wrongly instructed Mr. King not to answer questions he deemed irrelevant
5 and often did so with improper speaking objections.

6 Counsel for DPT attempted to question Mr. King regarding vehicle
7 sensors. Rather than simply interposing an objection, attorney Mays
8 demanded an explanation of the relevance of the line of questioning from
9 counsel for DPT. When counsel for DPT properly refused to engage with Mr.
10 Mays on the issue, Mr. Mays instructed his client not to answer solely on the
11 basis of relevance. (ECF No. 191 at 2; *see* ECF 192-3 at 51-52 for the
12 complete exchange).

13 Plaintiff now asserts that the objections to the line of questioning and
14 instructions not to answer were because the questioning was in bad faith and
15 intended to embarrass or harass Plaintiff. (ECF No. 150 at 6). Plaintiff
16 argues that the inquiry was so clearly irrelevant that “the clear implication is
17 that DPT intends to disparage IPS.” (ECF No. 150-1 at 16). DPT counters
18 that the line of questioning is relevant to a determination of what drives
19 sales of the parking meters at issue. (ECF No. 150-1 at 6 n.1).

20 Mr. Mays did not object or otherwise assert at the time that the line of
21 questioning was in bad faith or intended to unreasonably annoy or embarrass
22 Plaintiff or the witness. Had he thought so at the time, he was required to
23 move to terminate or limit the deposition under Rule 30(d)(3)(A). That he did
24 not do so speaks volumes. Although the relevance is questionable, and the
25 answers ultimately may not be admissible, Plaintiff has failed to convince the
26 Court that the line of questioning was “conducted in bad faith or in a manner
27 that unreasonably annoys, embarrasses, or oppresses the deponent or party.”

1 Rule 30(d)(2), Fed. R. Civ. P. The instruction not to answer this line of
2 questioning was improper and impeded and frustrated the fair examination
3 of the deponent.

4 Mr. Mays also objected on grounds of relevance and instructed Mr. King
5 not to answer questions regarding a consultant for Plaintiff named Julie
6 Dixon, who apparently performed project manager services for Plaintiff.
7 (ECF No. 191 at 2-4; 192-3 at 52-55). Although the relevance of this line of
8 questioning also is unclear, it was improper for Mr. Mays to instruct Mr.
9 King not to answer on grounds of relevance. Plaintiff has failed to convince
10 the Court that the line of questioning was “conducted in bad faith or in a
11 manner that unreasonably annoys, embarrasses, or oppresses the deponent
12 or party.” Rule 30(d)(2), Fed. R. Civ. P. The instruction not to answer this
13 line of questioning was improper and impeded and frustrated the fair
14 examination of the deponent.

15 b. Hall Deposition³

16 Regarding the Hall deposition, DPT asserts that counsel wrongly
17 instructed Mr. Hall not to answer certain questions based upon a claim of
18 attorney-client privilege and the common interest doctrine. (See ECF No. 191
19 at 8-10).

20 The Court finds that the appropriate vehicle for DPT to challenge the
21 assertion of privilege is a motion to compel under Rule 37(a)(3)(b)(i). That
22 would allow the matter to be fully briefed with appropriate declarations.
23 Under Rule 30(d)(2), having reviewed the record, the Court cannot find that
24 the assertion of privilege was frivolous and thus intended to frustrate the fair
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27 ³ A redacted version of the transcript of the Hall deposition can be viewed at ECF No. 192-2.

1 examination of the deponent.

2 II. Coaching

3 DPT asserts that Mr. Mays improperly coached witnesses Randall, King
4 and Schwarz through the use of suggestive objections and provides excerpts
5 for review. (*See* ECF No. 191-1). The excerpts are not only insufficient to the
6 task, they are misleading because they lack context. The excerpts reflect the
7 objections and conforming answers, painting a picture of coaching, but do not
8 supply the questions prompting the objections. If the objection is well-
9 founded, concise, and nonargumentative it is not likely to be suggestive.
10 Consequently, the Court was compelled to dive into the deposition
11 transcripts. The Court's joy in doing so, considering that the three
12 depositions cover over 800 pages, is boundless.

13 a. Randall Deposition⁴

14 Having reviewed the transcript of the Randall deposition, the Court
15 finds that Mr. Mays improperly coached Mr. Randall. For example, at page
16 30, lines 8-16, of the deposition, Mr. Randall was asked some basic questions
17 regarding his knowledge of his obligations as a corporate designee under Rule
18 30(b)(6):

19 Q. Do you understand that part of your responsibility as a
20 30(b)(6) corporate designee testifying on behalf of the company is to
21 attempt to prepare by learning information that the corporation may
22 have that you do not personally have?

22 MR. MAYS: Objection. Calls for a legal conclusion.

23 THE WITNESS: I'm not an attorney, so I couldn't answer that.

24 (ECF No. 192 at 11). And at page 31, lines 2-8:

25 _____

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27 ⁴ A redacted version of the transcript of the Randall deposition may be viewed at ECF No. 192.

1 Q. As a 30(b)(6) representative, you're testifying not with regard
2 solely to what you know but what the company, IPS Group, as a whole
3 knows. Do you – do you understand that?

4 MR. MAYS: Objection. Calls for a legal conclusion.

5 THE WITNESS: I'm not an attorney, but I

6 (*Id.*). There is nothing inappropriate or objectionable about asking a witness
7 if he or she understands why the witness is there and what the witness
8 understands of his or her obligations. The Court finds that interjecting these
9 baseless objections suggesting how the witness should respond set the tone
10 for the more serious problems to follow.

11 Mr. Randall apparently signed a declaration in connection with a
12 motion in this case. At page 71 of the transcript, counsel for DPT questioned
13 Mr. Randall regarding his own statements in the declaration:

14 Q. Okay. Well, if you could turn to paragraph 8 on page – Exhibit
15 A-page 31, please – the first sentence of paragraph 8 reads “IPS Group’s
16 M3 and M5 single-space parking meters incorporate the structures
17 covered by the patents asserted in this case.” Do you see that?

18 A. I do see that.

19 Q. Is it a true statement?

20 MR. MAYS: Objection. Calls for a legal conclusion and outside
21 the scope.

22 THE WITNESS: Again, I'm not an attorney. I rely on my
23 attorney and experts hired by attorneys to make legal assertions.

24 (ECF No. 192 at 21). Also regarding Mr. Randall's own declaration, at page
25 74, lines 10-20:

26 Q. Do the M3 and M5 single-space parking meters both
27 incorporate solar panels?

A. Yes, they do.

Q. Is that one of the structures covered by the patents asserted in
this case that you are referring to in the first sentence of paragraph 8 of
your declaration?

MR. MAYS: Objection. Calls for a legal conclusion. Outside the
scope.

1 THE WITNESS: Once again, I'm not an attorney. IPS has hired
2 attorneys and experts in order to make those determinations.

3 (*Id.* at 22). It is inconceivable that questions posed to a witness regarding the
4 accuracy of and basis for the witness' prior statements "calls for a legal
5 conclusion." That the witness avoided answering questions by parroting the
6 objection repeatedly throughout the transcript makes it clear to the Court
7 that Mr. Mays was coaching. The Court was hard-pressed to find more than
8 a few instances where Mr. Randall actually answered a question after the
9 "calls for a legal conclusion" objection was interposed. DPT had the absolute
10 right to question Mr. Randall regarding his prior sworn statement and was
11 impeded and frustrated in that regard by the improper coaching objections by
12 Mr. Mays.

13 b. King Deposition

14 As with the Randall deposition, DPT provided excerpts that only reflect
15 the objection and the conforming answer. In reviewing the King transcript,
16 the Court finds that Mr. King was coached. There are any number of
17 objections by Mr. Mays for vagueness, for calling for speculation, for calling
18 for a legal conclusion that are parroted by Mr. King in his responses. Yet, for
19 the most part, although improper, the Court finds that the coaching did not
20 rise to the level of frustrating the fair examination of the deponent. Ignoring
21 Rule 30(c)(2), however, is conduct that the Court needs to address.

22 c. Schwarz Deposition⁵

23 Once again, the Court was compelled to review the transcript to
24 determine, in the context of the questions asked, whether the interposed
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27 ⁵ A redacted version of the transcript of the Schwarz deposition can be viewed at ECF No. 192-1.

1 objections were improper coaching. As with Mr. King, Mr. Schwarz regularly
2 followed the lead of his attorney's objection in responding to a question. And,
3 as with Mr. King, although improper, the Court finds that the coaching did
4 not rise to the level of frustrating the fair examination of the deponent.
5 Ignoring Rule 30(c)(2), however, is conduct that the Court needs to address.

6 III. Speaking Objections

7 In the excerpts, DPT presents examples, of speaking objections by Mr.
8 May from the depositions of Messrs. Randall, King, and Schwarz. (ECF No.
9 191-2). Having been compelled to peruse the entirety of these transcripts,
10 the Court is firmly convinced that Mr. May made excessive use of speaking
11 objections. The unnecessary and inappropriate verbosity took up valuable
12 time but the Court is not going to measure it. Suffice to say, as annoying and
13 unprofessional as it was, the Court cannot say that it frustrated the fair
14 examination of the deponent. Ignoring Rule 30(c)(2), however, is conduct that
15 the Court needs to address.

16 IV. Unprofessional Conduct

17 DPT also presents an excerpt from the Randall deposition in which Mr.
18 Mays is accused of yelling, pointing and standing. (ECF No. 191-3; 192 at 22-
19 23). This exchange occurred while counsel for DPT was trying to get Mr.
20 Randall to answer questions regarding the accuracy and basis for his own
21 prior, sworn statement. As discussed above, Mr. Mays was dead wrong in
22 preventing his client from answering these questions and compounded his
23 error with incivility. This misconduct also will be addressed.

24 DPT also provides an excerpt from a sealed deposition in which Mr.
25 Mays is alleged to have committed misconduct by insisting that his client
26 read a lengthy document while refusing to go off the record. As DPT does not
27 mention the episode in its supporting Memorandum and does not seek any

1 particular relief in this regard, the Court will not address it.

2 V. Unprepared 30(b)(6) Witnesses

3 DPT provides excerpts from the depositions of Mr. Randall and Mr.
4 Schwarz which reflect that these witnesses were not properly prepared as
5 designees under Rule 30(b)(6) on certain topics. (See ECF No. 191-4). DPT
6 could have, under Rule 37(a)(3)(B)(ii), moved to compel and for sanctions on
7 the grounds that presenting an unprepared designee is tantamount to failing
8 designate at all on the given topics. But having limited the Court to
9 considering whether the fair examination of these deponents was impeded,
10 delayed or obstructed, the Court cannot, after reviewing the transcripts as a
11 whole, say that that is the case.

12 **CONCLUSIONS AND ORDER**

13 Rather than seeking to compel certain witnesses to answer specific
14 questions or to compel Plaintiff to produce designees prepared to testify on
15 specific topics, as it could have under Rule 37, DPT instead seeks more
16 general relief in the form of additional deposition time, some fees and costs
17 and an order preventing Plaintiff's counsel from coaching or making speaking
18 objections. Despite being limited under Rule 30(d)(2) to determining whether
19 the fair examination of certain deponents was delayed, frustrated or
20 impeded, the Court **GRANTS IN PART** the motion for sanctions and
21 **ORDERS** as follows:

- 22 1. DPT may depose Mr. King regarding parking sensors and Julie
23 Dixon. The deposition is limited to two hours. Plaintiff must
24 reimburse DPT for reasonable travel, attorney's fees, court reporting
25 and any facility costs for this renewed deposition.
- 26 2. DPT may depose Mr. Randall regarding his knowledge of his
27 obligations as a designee under Rule 30(b)(6) and regarding the

1 accuracy of and basis for statements previously made by him in this
2 litigation. The deposition is limited to two hours. Plaintiff must
3 reimburse DPT for reasonable travel, attorney's fees, court reporting
4 and any facility costs for this renewed deposition.

- 5 3. Objections to questions are limited to the following: "Objection as to
6 form." Witnesses may not be instructed not to answer any questions
7 unless necessary to enforce a privilege, to enforce a limitation
8 imposed by the Court (such as this Order), or to present a motion
9 under Rule 30(d)(3).
- 10 4. Mr. Mays is admonished to refrain, on pain of personal sanctions,
11 from further unprofessional outbursts and to re-read the Federal
12 Rules of Civil Procedure governing discovery and deposition practice.
- 13 5. Plaintiff's motion for a protective order is **DENIED** in light of the
14 Court's ruling.
- 15 6. DPT's motion for additional relief is **DENIED**.

16 **IT IS SO ORDERED.**

17 Dated: August 11, 2017

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19 Hon. Mitchell D. Dembin
20 United States Magistrate Judge
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